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DEC

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

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JAMES H. McKENNEY,
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No. 122.

DANIEL H. CARSTAIRS AND JOHN H. CARSTAIRS,
Copartners, Trading as
CARSTAIRS BROTHERS,
Plaintiffs in Error,

vs.

WILLIE R. COCHRAN,
Treasurer and Collector of Baltimore County.

In Error to the Court of Appeals of the State of Maryland.

BRIEF OF DEFENDANT IN ERROR.

D. G. McINTOSH,
Attorney for Defendant-in-Error.

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The question sought to be raised under the writ of error in this case is the validity of an Act of the Legislature of Maryland regulating the collection of taxes on distilled spirits.

I. *As to Jurisdiction.*

The first question presented is, does the record disclose a case in which this Court can assume jurisdiction, or, in other words, does the record show that a federal question was involved at the trial in the State Court.

To sustain the writ the record must show that such question not only might have been, but actually was raised and decided adversely to the plaintiffs in error.

In Gray vs. Coan, 154 U. S. 589, the Chief Justice, on a motion to dismiss a writ of error to the Supreme Court of Iowa, said: "On looking into the record we find no question under the 25th section of the Judiciary Act made by the pleadings or passed upon by the Court; and we have often held that it must appear affirmatively from the record that such a question was made and passed upon before the Court can acquire jurisdiction to review the judgment of a State Court upon writ of error."

In the case of Kansas Endowment and Benevolent Association vs. Kansas, 120 U. S. 103, the Court used the following language: "Certainly it does not appear unmistakeably on the face of the record, that the Supreme Court of the State either knew or ought to have known that the validity of the statute in question was challenged on account of its repugnacy to the Constitution or Laws of the United States."

See also—Sayward vs. Denny, 158 U. S. 180.
Green Bay Canal Co. vs. Patten Paper Co., 172 U. S. 58.
Mallot vs. North Carolina, 181 U. S. 589.
England vs. Gebhardt, 112 U. S. 504.
Chapin vs. Fye, 179 U. S. 129.
Kipley vs. Illinois, 170 U. S. 182.
Miller vs. Cornwall, 168 U. S. 131.
Levy vs. San Francisco, &c., 167 U. S. 175.
Bolln vs. Nebraska, 176 U. S. 90.

It must also appear of record that the federal question was specially, or specifically set up, or claimed in the State Court, at the proper time and in the proer way.

Ex parte Spies, 123 U. S. 131.
French vs. Hopkins, 124 U. S. 524.
Chappel vs. Bradshaw, 128 U. S. 132.
Chicago & N. W. R. R. vs. Chicago, 164 U. S. 454.
Clark vs. McDade, 165 U. S. 168.
Erin R. Co. vs. Prudy, 185 U. S. 148.
N. Y. C. & H. R. R. Co. vs. New York, 186 U. S. 269.

A federal question can not be raised for the first time, after final decision in the State Court for the purpose of supporting a writ of error.

Scudder vs. Coler, 175 U. S. 32.

In California National Bank of San Francisco vs. Thomas, 171 U. S., 441, this Court speaking of the record said: "In all this record there was no federal right specially set up, or claimed by the plaintiff in error, until after the judgment in the Supreme Court, when a petition for the writ of error was filed by the California National Bank, a co-defendant with Thomas in the original action in which various allegations were made of a denial of federal rights."

In the case at bar neither the pleadings, nor the bills of exceptions containing the evidence and the instructions of the Court, disclose the presence of a federal question.

In the language of the Court, in Sayward vs. Denny, 158 U. S. 180, there is nothing in the record to indicate that the State Court was led to suppose that plaintiff in error claimed protection under the Constitution of the United States for the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument.

In Medbury vs. Ohio, 24 Howard, 413, and England vs. Gebhardt, 112 U. S. 504, it was held that the opinion of the Court was no part of the record. Later decisions of this Court seem to have departed from that rule. In the opinion of the Court of Appeals of Maryland, accompanying the record, the construction and validity of the Maryland Statute is discussed and passed upon, but not with any reference to the Constitution or laws of the United States. The decision of that Court covered two points: *First.* The law in question was upheld as not being in conflict with Article 15 of the Declaration of Rights in the Constitution of Maryland, in laying a tax upon property, in contradistinction to the owners of the property; and *second*, the construction given to the law was, that it did not compel one person to pay the debt of another.

As to the first point decided, this Court will not declare a State law void on account of its collision with a State Constitution or bill of rights (supposing such to be the case), it not being a case embraced in the Judiciary Act.

Medberry vs. Ohio, 24 Howard, 413.
Salamon vs. Graham, 15 Wallace, 208.

As to the other point; when the decree of a State Court turns upon its construction of a State statute, and not upon its constitutionality, this Court will not take jurisdiction on a writ of error under the 25th section of the Judiciary Act. It is the peculiar province and privilege of the State Court to construe its own statute.

Commercial Bank vs. Buckingham, 5 Howard, 317.
Adam vs. Preston, 22 Howard, 473.
Lent vs. Tilson, 140 U. S. 316.
Striker vs. Goodwin, 123 U. S. 527.
Morley vs. Lake Shore, etc., 146 U. S. 162.

A question of State law alone does not present a federal question so as to give this Court jurisdiction over a State judgment.

Hoyt vs. Thompson, 1st Black, 518.
Congdon vs. Goodman, 2 Black, 574.
Serial vs. Haskell, 14 Wallace, 12.

This Court has no power to review the decisions of State Courts upon questions of general law.

United States vs. Thompson, 93 U. S. 586.

Doubtless it will be claimed that under the authority of Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S., 232, a federal question was in the record, and whether adverted to or not was necessarily involved in the decision of the case. In disposing of the motion to dismiss in that case, this Court states that there was color for making the motion to dismiss, the Supreme Court of Pennsylvania in its opinion not seeming to have expressly passed upon the federal question, although it was clearly in the record.

The motion to dismiss the writ of error and affirm the judgment below is, therefore, respectfully submitted.

II. *As to the Merits.*

The writ of error in this case is prosecuted on the ground as asserted by the plaintiffs, that the Statute of Maryland, chapter 703 of the Acts of 1892, imposing a tax on distilled spirits, as amended by the Act of 1900, chapter 370, is repugnant to the Constitution of the United States.

The highest Court of the State has declared for the third time that the law itself did not infringe any constitutional right.

Monticello Co. vs. Baltimore City, 90 Md. 416.
Fowble vs. Kemp, 92 Md. 630.
Carstairs vs. Cochran, 95 Md. 488.

The persistent efforts to defeat this law show a determined purpose on the part of distillers of spirits to remove, if possible, from the reach of taxation a large mass of valuable property yielding large revenues to the State. Previous to the enactment of this law this species of property had escaped taxation in the State of Maryland, except possibly such small proportion as the distiller might voluntarily choose to return and pay on.

The regulations established by the United States Government for the collection of internal revenue on distilled spirits, and for the control and management of bonded warehouses in which the spirits are stored, place them beyond the reach of the ordinary methods used in the collection of taxes.

It is impossible for the State or municipal tax collector to levy or distrain on the spirits and thereby enforce collection of the taxes for the reason that the warehouses in which they are stored are under supervision and control of the United States Government.

A special system had to be devised which would insure the collection of the tax, while not interfering with governmental regulations.

The Act of 1892, Chapter 704, was the remedy resorted to by the State of Maryland. The main features of the law are not original with that statute. The State of Kentucky, probably the largest distiller of any State in the Union, had previously enacted laws containing substantially the same provisions for the assessment of spirits and the collection of taxes thereon.

Sections 4109 and 4111 of the Kentucky statutes, make the custodian of the spirits in bonded warehouses liable for State and municipal taxes, and require the proprietor of such warehouses to report and pay such tax. These provisions of the Kentucky statute have been before the Court of Appeals of that State a number of times. Their validity was directly assailed upon the ground that the

spirits could not be assessed to persons in possession who were not the owners. In the case of Commonwealth vs. Gains, 80 Kentucky, 489, the decision of the highest Court of that State sustained the law.

If the contention of the plaintiffs in error prevails and the Maryland Statute be declared unconstitutional, the effect will be to exempt from taxation a large amount of property which peculiarly invites and enjoys the protection of law. But protection implies taxation and the two are reciprocal.

The following propositions must be conceded in any discussion of the question:

First. That distilled spirits are goods and commodities and form a proper subject for taxation; and that a State has the power to tax all property having a situs within its territorial limits.

Pullman Palace Car Co. vs. Pa., 141 U. S. 18.
Fichlen vs. Shelby Co. Tax District, 145 U. S. 1.
P. & S. C. Co. vs. Bates, 156 U. S. 577.
Myers & Housman vs. Baltimore Co., 83 Md. 385.
Hopkins vs. Baker, 78 Md. 363.
Howell vs. State, 3 Gill, page 23.

In the case last cited the Court says: "The power of taxation extends to all the people of the government, and embraces everything which may be fairly considered as constituting a part of the mass of property within the State. This is a cardinal principle, on the preservation and application of which the existence of State government depends."

Referring to the phrase used in the 33d number of the Federalist, that the individual States would, under the proposed constitution, retain an independent and uncontrollable authority, to raise revenue to any extent of which they may stand in need, by "every kind of taxation," except duties on imports and exports. The Court adds:

"By every kind of taxation they mean the right to tax all persons and property within the jurisdiction of the State, and as such, subject to the taxing power, with the single exception of duties on imports and exports."

Second. Having the power, it becomes the duty of the State to impose taxes so that they bear equally upon all persons, and this can only be done by subjecting to taxation all property not legally exempt. Every properly devised revenue system must be framed along these lines. It is only necessary that the tax be laid for a public purpose, and bears equally upon those similarly situated.

This was the object aimed at in the 15th Article of the Declaration of Rights in the Constitution of Maryland; and such is the rule, approved alike by economists and jurists.

Adam Smith's Wealth of Nations, Bk. 5, ch. 2, pt. 2, page 651.
Vattel, Law of Nations, Bk. 1, ch. 20, sec. 240.
Cooley's Constitutional Limitations, 6th Ed., ch. 14, page 607.
People vs. N. Y. City and County, 76 N. Y. 64.

Third. It is for the law-making power to determine all questions of discretion or policy in ordering and apportioning taxes, and to make all necessary rules and regulations, and decide upon the mode by which the taxes shall be collected.

This Court has said, in Pullman's Palace Car Co. vs. Pa., *supra:* "For the purpose of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner and he may be taxed on its account, at the place where it is, although not the place of his own domicil and even if he is not a citizen or a resident of the State which imposed the tax."

Quoting Justice Story's Conflict of Laws, Section 550, the opinion adds: "Although movables are for many pur-

poses to be deemed to have no *situs* except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

In Jennings vs. Cold Ridge Iron Co., 147 U. S. 148, where the tax imposed by the State was deducted by the company from the interest on its mortgage bonds held by the plaintiff in error, which he declined to receive, the bonds being assessed at their face instead of their legal value, it was held, the provision in the 14th Amendment of the Constitution of the United States, that no State should deny to any person the equal protection of the law, does not prevent a State from adjusting its system of taxation in all proper and reasonable ways, not compelling States to adopt an iron rule of taxation.

In the case of Bell's Gap R. R. Co. vs. Pa., *supra*, on the strength of which the previous case was decided, and in which the tax was resisted on several grounds, and among others, on the ground that the corporation was taxed for property it did not own, the Court, speaking of the purpose and scope of the 14th Amendment and the general qualification necessary to be applied to it, quotes with approval the language of Justice Field in Barbier vs. Connolly, 113 U. S., 27: "The XIVth Amendment, in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their

happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and their property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the Amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, some times called the police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

Fourth. The construction given by the Maryland Court in 90 Md. 416, 92 Md. 630, and 95 Md. 488, to the Act of 1892, chapter 704, providing for the collection of taxes on distilled spirits, is in entire harmony with its previous rulings upon similar questions.

In U. S. Electric Power and Light Co. vs. State, reported in 79 Md. 63, where one of the questions was whether the company could be compelled to pay taxes on capital stock issued by it, the value of which was fixed by the State Tax Commissioner, the Court uses the following language:

"Upon the valuation thus ascertained the State tax is levied. But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the State for the collection of the State tax. It is not material what assets or other property make up the value of the shares. These shares are property, and under existing laws are taxable property. They belong to the

stockholders respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the State tax upon these shares into the State treasury, it pays the tax not upon the company's own property, nor for the company, but upon the property of each stockholder and for each stockholder respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares is taxed on account of his ownership and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all."

See also—Casualty Insurance Co. Case, 82 Md. 564.
American Coal Co. vs. County Commissioners, 59 Md. 194.

In the last case the analogy between the principles announced by the State Court and those asserted by this Court in Kirtland vs. Hotchkiss, 100 U. S. 491, and Nevada Bank vs. Sedgwick, 104 U. S. 111, were pointed out and commented on.

The most recent decision in Maryland is the case of Corry vs. Baltimore City, 96 Md. 310, where the subject underwent an elaborate discussion at the hands of counsel and Court. The views expressed by the Court in that case were held to be in harmony with the following Federal decisions:

New Orleans vs. Stempel, 175 U. S. 309.
Savings and Loan Society vs. Multnomak County, 169 U. S. 421.
McCulloch vs. Maryland, 4 Wheaton, 316.
Coe vs. Errol, 116 U. S. 517.
Pullman Car Co. vs. Pa., 141 U. S. 111.
Kirtland vs. Hotchkiss, 141 U. S. 591.
Bristol vs. Washington Co., 177 U. S. 139.

In view of the long settled policy which is thus shown to have obtained in the State of Maryland, in the collection

of taxes, especially as determined in cases where the tax on corporate stock was required to be paid by officers of the company, and the recognition of the same principle by the Federal Courts, it is difficult to perceive how the contention of the plaintiffs in error can be sustained, when its certain effect would be to exempt from taxation this class of property.

The reasoning of the Maryland Court in the several cases referred to, where the validity of the law in question was assailed, has pointed out the fallacy upon which the plaintiffs' contention rests, and has shown that the cases relied on by them are not applicable to the present controversy. It would be worse than repetition to attempt again to cover this ground.

It may be said, of the plaintiffs' claim, that the distiller is taxed for property he does not own, as was said in Bell's Gapp R. R. Co. Case, *supra*: "This objection is not true in point of fact. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience and as a secure method of collecting the tax."

It may be said in conclusion, the distiller embarks in business with full knowledge of the law and all the surrounding conditions. The State has protected him as far as it could do so by giving him a lien on the spirits, for the amount of taxes paid by him. He has it in his power to provide any other safeguards which may be desired when he puts his goods on the market and offers them for sale. The goods are in his custody, and it is for him to impose conditions which will protect not only the State but himself.

The issuance of negotiable warehouse receipts representing title to the goods, is a mere custom, or incident in the course of trade. There is no reason why such receipts can not be drawn to protect the manufacturer or custodian of the spirts as well as the purchaser.

Knowledge of the law must be imputed to both.

The duty of paying the tax being cast by law on the custodian of the goods, it is competent for him to reimburse himself for the taxes paid before he parts with possession. The law imposes the tax, and the payment of it is a lien. The purchaser buys subject to that lien. It becomes simply a matter of commercial convenience, how that shall be adjusted between buyer and seller. It surely can not be seriously argued that the adoption of any custom which fails to take note of the law is such a circumstance as can have the effect of paralyzing the law and rendering the goods exempt from tax. The preservation of a wise system of equality and justice in enforcing its revenue law, is more important to the State than the upholding of a so-called custom which is alleged to be in the interest of trade convenience.

Respectfully submitted,

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